

JUN 14 PAGE 4

(3)
No. 89-1793

Supreme Court, U.S.
FILED

JUN 5 1990

JOHN W. F. GIBSON, JR.
CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS M. GAUBERT

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**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent argues that the Fifth Circuit's treatment of our discretionary function claim is dicta, because that court remanded the case for further proceedings. Br. in Opp. 1, 2, 10, 18, 19. That argument is frivolous.

In the district court, we moved to dismiss respondent's complaint on the ground that his tort claims are barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a). The district court granted our motion on that ground, and dismissed respondent's complaint in its entirety. If the court of appeals had agreed with the district

court, it would have affirmed. But it reversed (in part) *because* it disagreed on the discretionary function issue, and then remanded the case for further proceedings. Thus, the court of appeals' judgment of reversal rested squarely on its conclusion with respect to the discretionary function exception.

2. Respondent also argues that the decision below is interlocutory, since the Fifth Circuit remanded the case for further proceedings. Br. in Opp. 1, 2, 10-12, 15, 18, 19, 20, 21. That is true, but immaterial.

The decision below resolves the question whether, as a matter of law, the action is barred by the discretionary function exception. Moreover, that question, as the courts below recognized, Pet. App. 5a-6a, is jurisdictional, since the exception is a limitation on the federal government's waiver of sovereign immunity. See generally *United States v. Mottaz*, 476 U.S. 834, 841 (1986); *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (where action depends upon a waiver of the sovereign immunity of the United States, the statutory terms and conditions of the waiver "define [a] court's jurisdiction to entertain the suit"). By contrast, the issue that the Fifth Circuit directed the district court to resolve on remand—*i.e.*, whether respondent has a cause of action under Texas law for the lost personal property that he posted as part of the neutralization agreement, Pet. App. 19a-20a—is not a jurisdictional question. Although the court of appeals began by characterizing this issue as one of "standing," *id.* at 14a, its analysis of the issue being remanded focused on whether there had been an undertaking to use due care, and its conclusion was that it could not "pass on whether [respondent] has a cause of action in this regard." *Id.* at 19a (emphasis added). And there can be no doubt that the question that the court of

appeals did decide conclusively—the applicability of the discretionary function exception—is both jurisdictional and important. Accordingly, as one authority has explained, where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 225 (6th ed. 1986). See *id.* at 225-226 and cases cited therein.

3. Respondent maintains that the Fifth Circuit did not exclude all "operational" actions from the discretionary function exception—that the Fifth Circuit simply excluded the government's activities in this case. Br. in Opp. 15-16. The Fifth Circuit's opinion, however, belies that claim. According to that court, respondent's argument that "the actions of the FHLBB and FHLB-Dallas lost the protection of the discretionary function exception when they began to assume operational, day-to-day control over IASA" was a "well-taken point." Pet. App. 6a. The court said that *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), "establish[ed] the principled distinction between policy decisions and operational actions," a "distinction" that "still retains its force today and is dispositive of this case." Pet. App. 7a (emphasis added). The court concluded that "[a]ny doubts about the sustained viability of th[e] ['discretionary function/operational activity'] distinction were put to rest" by footnote 3 in *Berkovitz v. United States*, 486 U.S. 531 (1988). Pet. App. 11a. Thus, the court concluded, any activity that is "operational in nature" necessarily falls outside the scope of the exception. *Id.* at 12a. And the Fifth Circuit summarized that "the FHLBB and FHLB-Dallas officials

were only protected by the discretionary function exception until their actions became operational in nature and thus crossed the line established in *Indian Towing*." *Id.* at 12a-13a.

In sum, the Fifth Circuit made it quite clear that it was adopting a rule of law that "operational" activities do not fit within the discretionary function exception, a rule that was not limited to the facts of this case. The decision on this important question is therefore an appropriate one for this Court to review.

4. Respondent argues that the decision below rests on the allegedly peculiar facts of this case and does not conflict with the decisions cited in our petition. Br. in Opp. 19-21. Respondent does not (and could not) deny that other circuits have rejected an "operational" limitation on the discretionary function exception. See Pet. 18-19. The Ninth Circuit did so expressly in *Begay v. United States*, 768 F.2d 1059, 1062-1063 n.2 (1985) (citations omitted), explaining that:

In the past, we have used the planning level/operational level dichotomy when analyzing the application of the discretionary function exception. * * * In recognition of the problems that surround the application of the discretionary function exception, and in light of the Supreme Court's recent decision in [*United States v. Varig Airlines*, 467 U.S. 797 (1984)], we believe that the proper approach to determining when the exception applies is for the court to look to the nature of the conduct in question.

Respondent's argument that the Fifth Circuit did not endorse such an "operational" limitation in this case rests on the same flaw as respondent's prior argument. As we have explained, the Fifth Circuit squarely held that the actions of the federal officials

challenged in this case did not fit within the discretionary function exception because those actions were operational in nature. The Fifth Circuit thereby revived the operational limitation on the discretionary function exception that this Court rejected in the *Varig* case and that other circuits have rejected since then. Accordingly, there is a clear conflict among the circuits on the proper application of that exception, a conflict that only this Court can resolve.

* * * *

For the foregoing reasons and those in the petition, the petition for a writ of certiorari should be granted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

JUNE 1990

* The Solicitor General is disqualified in this case.